

February 13, 2014

Diana Mahmud
City Councilmember
1602 Camden Parkway
South Pasadena, CA 91030

Re: Your Request for Advice
Our File No. A-14-017

Dear Ms. Mahmud:

This letter responds to your request for advice regarding the conflict-of-interest provisions of the Political Reform Act (the “Act”).¹ Please note that because the Fair Political Practices Commission (the “Commission”) does not act as a finder of fact when it renders assistance (*In re Oglesby* (1975) 1 FPPC Ops. 71), this letter is based on the facts presented. We also note that we do not provide advice on past conduct and our advice is based solely on the provisions of the Act.

QUESTION

May you request that the City Manager seek a legal opinion to determine whether legal errors are present in certain CEQA interpretations provided to the Planning Commission by South Pasadena City staff and its attorney with respect to a Conditional Use Permit?

CONCLUSION

No. You may not request that the City Manager seek a legal opinion concerning the specified CEQA interpretations unless you can rebut the presumption of materiality imposed by Regulation 18705.2(a)(1) by showing that it is not reasonably foreseeable the decision will have *any* financial effect on your real property.

¹ The Political Reform Act is contained in Government Code Sections 81000 through 91014. All statutory references are to the Government Code, unless otherwise indicated. The regulations of the Fair Political Practices Commission are contained in Sections 18110 through 18997 of Title 2 of the California Code of Regulations. All regulatory references are to Title 2, Division 6 of the California Code of Regulations, unless otherwise indicated.

FACTS

You are a recently elected City Council member of the City of South Pasadena, which has a population of approximately 26,000 people.

The City's Planning Commission recently met to consider the issuance of a Conditional Use Permit ("CUP") to allow a church located across the street from your home to lease two buildings on church property for operation of an after-school child care center operated by a third party, Kids Klub. Although the church property spans over 4 acres, one of the two buildings proposed to be leased to Kids Klub is within 500 feet of your home.

Kids Klub sought Planning Commission approval of its CUP application to convert two presently unutilized church buildings to an after-school child care center for 70 children on school days and for 120 children for a day-long winter, spring and summer camp when school is not in session. Staff concluded that the project was "categorically exempt" under CEQA as a class 1 project, and did not warrant an initial study to determine if an Environmental Impact Report, Negative Declaration or Mitigated Negative Declaration is appropriate.

However, according to your letter, that exemption under CEQA only applies where there is "negligible or no expansion of use beyond that existing at the time of the lead agency's determination." You state that no evidence was introduced to support the finding of "negligible or no expansion of use" of the facility. You note actually that the Staff Report found that an approved CUP "would limit the operational hours to 7:30 AM to 6:00 PM when the church grounds are underutilized." Also, during the hearing the applicant's representatives acknowledged the buildings are presently not utilized. You believe Staff focused on the relatively minor scope of the construction project, consisting of some interior modifications of the rooms in question, and did not address the impact of the change in use of the presently unused facilities, which will introduce between 140 and 240 new vehicle trips daily into the area.

In addition, you indicated that the Planning Commissioners acknowledged and neighbors testified that the residential area surrounding the church is already heavily impacted by traffic due to the location of a very popular YMCA across the street from it. However, you stated that the Deputy City Attorney advised the Commissioners that they could only consider the impact of this project, and not the cumulative impact of its development in the neighborhood. You believe this advice was legally incorrect.

In your opinion, you believe two or three significant legal errors occurred with respect to the advice and interpretations related to certain CEQA provisions. Because of at least one potential error, the project qualified as "categorically exempt" and may not have to undergo an environmental review, which is at the heart of CEQA. In addition, you are concerned that if City staff and its attorney erroneously interpret CEQA provisions, it will expose the City to potential liability in this and future matters. As a result, you would like to approach the City Manager to request legal opinions regarding these issues.

ANALYSIS

Section 87100 prohibits any public official from making, participating in making, or using his or her official position to influence a governmental decision in which the official has a financial interest. A public official has a “financial interest” in a decision, within the meaning of the Act, if it is reasonably foreseeable that the decision will have a material financial effect on one or more of the public official’s interests. (Section 87103; Regulation 18700(a).) The Commission has adopted an eight-step standard analysis for deciding whether an individual has a disqualifying conflict of interest in any given governmental decision.

As a councilmember for the City of South Pasadena who intends to request that the City Manager seek a legal opinion concerning various CEQA interpretations involving Conditional Use Permit within 500 feet of your residence, you are a public official who will be participating² in a governmental decision. You therefore meet steps one and two.

Step Three: What are your interests?

Of the interests recognized under the Act,³ those interests implicated by your account of the facts are the following:

Real Property – A public official has an interest in real property in which he or she has a direct or indirect interest of \$2,000 or more. (Section 87103(b); Regulation 18703.2.)

As stated above, you own a home located within 500 feet of the building that is the subject of a Conditional Use Permit. Assuming your interest in the home is worth \$2,000 or more, the real property is an economic interest. (Section 87103(b).)

Step Four: Will your interest be directly or indirectly involved in the upcoming governmental decision.

Real property in which a public official has an interest is directly involved in a governmental decision if it is located within 500 feet of the boundaries of the property that is the subject of the governmental decision. (Regulation 18704.2(a)(1).)

Because you own a home located within 500 feet of the building that is the subject of the Conditional Use Permit, your interest in the real property will be *directly* involved in the decision

² A public official “participates in making a governmental decision” when, acting within the authority of his or her position and without significant substantive or intervening review, the official negotiates, advises or makes recommendations to the decision-maker regarding the governmental decision. (Section 87100; Regulation 18702.2.)

³ Our analysis is limited to the economic interests you have identified.

to request that your City Manager seek a legal opinion concerning certain CEQA interpretations described above.

Steps Five and Six: Will there be a reasonably foreseeable material financial effect on your interest?

Materiality

A conflict of interest may arise only when the reasonably foreseeable impact of a governmental decision on a public official's economic interests is material. (Regulation 18700(a).) Different standards apply to determine whether a reasonably foreseeable financial effect on an economic interest will be material, depending on the nature of the economic interest and whether that interest is directly or indirectly involved in the agency's decision.

Regulation 18705.2(a)(1) provides the materiality standard for *directly* involved real property as follows:

The financial effect of a governmental decision on the real property is presumed to be material. This presumption may be rebutted by proof that it is not reasonably foreseeable that the governmental decision will have *any* financial effect on the real property. (Emphasis added.)

Under this rule, the financial effect of the decision is material even if it has only a one penny effect. This is commonly referred to as the "one penny rule." In order to rebut this presumption, it is necessary to establish that the decision would not even affect the property's value by one cent.

Foreseeability

Once a public official identifies his or her relevant economic interests, the official must evaluate whether it is reasonably foreseeable that the decision will have a material financial effect on any of those economic interests. For a material financial effect to be foreseeable on an official's economic interest, it need not be certain or even substantially likely that it will happen. However, the financial effect must be more than a mere possibility. (Regulation 18706(a); *In re Thorner* (1975) 1 FPPC Ops. 198.)

Ultimately, whether a material financial effect is foreseeable at the time a decision is made depends on facts and circumstances peculiar to each case. (*In re Thorner, supra.*) Because the Commission does not act as a finder of fact in providing advice (*In re Oglesby, supra*), the foreseeability of a particular financial effect is a determination that must be left, in most instances, to the informed judgment of the public official.

As mentioned, it is assumed that any financial effect of a governmental decision on real property that is directly involved in the governmental decision is material. Based on the

information you provided, we are unable to conclude that this presumption is rebuttable. However, we note that Regulation 18706(b), a copy of which is enclosed, lists a number of factors which should be considered in your ultimate determination as to whether it is reasonably foreseeable that the decision will materially affect your real property.

Accordingly, unless you can rebut the presumption of materiality imposed by Regulation 18705.2(a)(1) by showing that it is not reasonably foreseeable the decision will have *any* financial effect on your real property, you may not request that the City Manager seek a legal opinion to determine whether legal errors are present in the CEQA interpretations discussed above.

Steps Seven and Eight: Does the governmental decision come within any exception to the conflict-of-interest rules?

You have not provided any facts suggesting either the “public generally” or the “legally required participation” exceptions would apply to your circumstances, so we will not address them further.

If you have other questions on this matter, please contact me at (916) 322-5660.

Sincerely,

Zackery P. Morazzini
General Counsel

By: Jack Woodside
Senior Counsel, Legal Division

JW:jgl

Enclosure